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Nos. 94-1829 and 94-1976

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC., ET AL., PETITIONERS

v.

STATE OF ALASKA, ET AL.

ALASKA STATE LEGISLATURE, PETITIONER

v.

STATE OF ALASKA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The State of Alaska dismissed its interlocutory appeal of the district court's ruling that the Secretaries of Agriculture and the Interior have authority to administer provisions of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101 *et seq.* The question presented is whether the court of appeals properly denied petitioners' subsequent motions to intervene for the purpose of pursuing an appeal.

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OPINIONS BELOW

The orders of the court of appeals denying petitioners' motions to intervene and dismissing the interlocutory appeal on the issue of the Secretary's authority to administer the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.* (94-1829 Pet. App. 3a-10a; 94-1976 Pet. App. A1-A4)

are unreported. The subsequent opinion of the court of appeals, addressing the issue of the definition of "public lands" under ANILCA (94-1829 Pet. App. 11a-22a), is reported at 54 F.3d 549. The order of the district court certifying both issues for interlocutory appeal (94-1976 Pet. App. A6-A11) is unreported. The opinion of the district court (94-1829 Pet. App. 23a-65a; 94-1976 Pet. App. A12-A53) is unreported.

JURISDICTION

The court of appeals denied petitioners' motions to intervene on February 7, 1995 and February 23, 1995. Petitions for rehearing were denied on March 7, 1995 and March 22, 1995. 94-1829 Pet. App. 1a-2a; 94-1976 Pet. App. A5. The petitions for a writ of certiorari were filed on May 5, 1995 and June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Alaska National Interest Lands Conservation Act (ANILCA or the Act), Pub. L. No. 96-487, 94 Stat. 2371, 16 U.S.C. 3101 *et seq.*, regulates the use of "certain lands and waters in the State of Alaska" that contain nationally significant natural, cultural, recreational, and wildlife values, among others. See 16 U.S.C. 3101(a). One of Congress's purposes in ANILCA was "to provide the opportunity for rural residents [of Alaska] engaged in a subsistence way of life to continue to do so." 16 U.S.C. 3101(c). The Act declares it to be congressional policy "to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of [public] lands." 16 U.S.C. 3112(1). To that end, the Act establishes a priority for "the taking on public

lands of fish and wildlife for nonwasteful subsistence uses * * * over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114.

ANILCA defines "subsistence uses" as "the customary and traditional uses by rural Alaska residents of wild, renewable resources." 16 U.S.C. 3113. It also defines "public lands" to be (with certain exceptions) lands situated within Alaska that are "Federal lands." 16 U.S.C. 3102(3). "Federal land," in turn, is defined to mean "lands the title to which is in the United States" (16 U.S.C. 3102(2)), and "land" is defined to mean "lands, waters, and interests therein" (16 U.S.C. 3102(1)).

Title VIII of ANILCA authorizes the Secretary of the Interior[1] to "prescribe such regulations as are necessary and appropriate to carry out his responsibilities" under the Act. 16 U.S.C. 3124. Title VIII also directs the Secretary to establish regional advisory councils to review and evaluate proposals for the subsistence use of fish and wildlife. 16 U.S.C. 3115(a). The Secretary must consider the reports and recommendations of the regional advisory councils when exercising his "administrative authority over the public lands," 16 U.S.C. 3115(c), but he need not follow the recommendation of a regional advisory council if he determines that the recommendation "would be detrimental to the satisfaction of subsistence needs." *Ibid.*

In recognition of the State of Alaska's traditional exercise of authority over the public lands in the

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[1] The Secretary of the Interior has principal responsibility for administering the public lands governed by ANILCA, but the Secretary of Agriculture has authority for the lands within the National Forest System. 16 U.S.C. 3102(12).

State, Title VIII permits the establishment of an alternative state regulatory structure to protect subsistence use of public lands by rural Alaska residents. The Act provides that, if within one year of its enactment, the State of Alaska "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural Alaska residents, then the Secretary shall not implement the sections of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. 3115(d). Instead, the state laws, "unless and until repealed, shall supersede such sections [of ANILCA] insofar as such sections govern State responsibility * * * for the taking of fish and wildlife on the public lands for subsistence uses." *Ibid.*; see *Kenaitze Indian Tribe* v. *Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

When ANILCA was enacted, both the State of Alaska and the federal government anticipated that the preference for subsistence uses of public lands by rural residents would be administered by the State, pursuant to a state regulatory scheme. In fact, at the time of ANILCA's enactment, Alaska had already adopted a statute conforming generally to ANILCA's requirements for management of subsistence uses of fish and wildlife, including a priority for nonwasteful subsistence use of wild, renewable resources. However, under the state statute, eligibility for the priority was not limited, as required by ANILCA, to rural Alaska residents. The State therefore promulgated regulations limiting eligibility for the priority to rural residents. After review and approval of the state regulatory scheme by the Secretaries of

Agriculture and the Interior, the State became responsible for regulation of subsistence use of wild renewable resources on May 14, 1982. See *Kenaitze*, 860 F.2d at 314.

In 1985, the Alaska Supreme Court invalidated the State's regulations governing eligibility for subsistence fishing as inconsistent with the governing state statute. *Madison* v. *Alaska Dep't of Fish & Game*, 696 P.2d 168. Without those eligibility regulations, the State's subsistence priority fell out of compliance with ANILCA, and the Secretary of the Interior withdrew certification of the State's regulatory scheme, pending enactment of new subsistence legislation consistent with ANILCA. *Kenaitze*, 860 F.2d at 314. The State then enacted legislation to remedy the inconsistency between its subsistence statute and ANILCA, and the Secretary of the Interior certified that Alaska's subsistence use legislation was again in compliance with ANILCA. *Ibid.* In 1989, however, the Alaska Supreme Court ruled that the amended subsistence statute violated Article VIII of the Alaska Constitution, which (it held) prohibits the State from according a preference for the use of natural resources on the basis of residency. *McDowell* v. *Alaska*, 785 P.2d 1, 6-9. Because ANILCA expressly reserves the priority for subsistence use on public lands to rural Alaska residents, the State was unable to exercise its authority under the Act, and the Secretary took over implementation of ANILCA's preference. See 55 Fed. Reg. 27,114 (1990).

2. On June 29, 1990, the Departments of Agriculture and the Interior jointly published temporary regulations governing subsistence uses of the public lands in Alaska. 55 Fed. Reg. 27,114. The regulations

provided that the priority for subsistence use on "public lands" did not apply to navigable waters. The agencies noted that "[t]he United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands." *Id.* at 27,115; see *id.* at 27,118. The final regulations, which made no relevant change in the interpretation of the scope of federal authority (see 57 Fed. Reg. 22,942 (1992)), provided that the priority for subsistence use was limited to "all public lands including all non-navigable waters located on these lands." 50 C.F.R. 100.3(b).

On December 5, 1990, a group of Native Alaskans filed suit against the United States in the United States District Court for the District of Alaska, challenging the exclusion of navigable waters from the federal subsistence regulations. *Katie John* v. *United States*, No. CV-90-484. The *Katie John* plaintiffs conduct subsistence fishing at Batzulnetas, Alaska, within Wrangell-St. Elias National Park and near the confluence of Tanada Creek and the Copper River, which are navigable waters. The plaintiffs sought extension of the priority for subsistence fishing for rural Alaskans to those waters. See 94-1976 Pet. App. A31-A32.

On February 27, 1992, the State of Alaska brought a separate action in district court, challenging the federal government's authority to manage subsistence uses of fish and game at all under Title VIII of ANILCA. *Alaska* v. *United States*, No. CV-92-264. The State contended that the federal subsistence regulations impermissibly diminished the State's authority to manage fish and wildlife, and it argued that, under ANILCA, the State retained authority over fish and wildlife on public lands, even though it

had no enforceable law respecting the statutorily mandated priority for rural Alaskans' subsistence use.

The district court consolidated the State's challenge with the *Katie John* litigation. On March 30, 1994, it ruled that the federal government had authority under Title VIII of ANILCA to assume administration of the subsistence priority, after the Alaska Supreme Court invalidated the State's subsistence law. 94-1976 Pet. App. A21-A30. In the same opinion, the court also concluded that the Secretary had erroneously construed federal "public lands," as that term is used in ANILCA, to exclude navigable waters; it held that the statutory term (and therefore the federal priority for subsistence use) covers all navigable waters in Alaska. *Id.* at A46, A48. The district court therefore granted the *Katie John* plaintiffs' motion for partial summary judgment and denied the dispositive motions filed by the State and the federal government. *Id.* at A48.

The district court certified its order granting partial summary judgment for interlocutory review by the Ninth Circuit under 28 U.S.C. 1292(b). 94-1976 Pet. App. A6-A11. On April 14, 1994, the State of Alaska filed a petition for interlocutory appeal with the Ninth Circuit, seeking permission to appeal on both issues resolved by the district court. On May 19, 1994, the Ninth Circuit granted permission to appeal, and briefs were filed addressing both issues.

On January 23, 1995, the Governor of Alaska announced that he intended to direct the dismissal of the State's appeal of the district court's conclusion that the federal government had authority to implement ANILCA. The State subsequently dismissed its interlocutory appeal on that issue by

stipulation with all parties. On January 25, 1995, a resolution was introduced in both Houses of the Alaska Legislature (94-1976 Pet. App. A70-A73), urging the Governor not to dismiss the appeal on the question of the federal government's authority, and resolving, if the Governor dismissed the appeal, to "intervene as a representative of the citizens of the State of Alaska to continue the lawsuit and advocate the position that the Secretary of the Interior and the Secretary of Agriculture do not have the authority to assume management of fish and wildlife on public land in the State of Alaska." *Id.* at A72. That resolution was passed by the Alaska Senate on January 26, 1995, and by the Alaska House of Representatives on January 30, 1995.

On January 27, 1995, the Legislature of the State of Alaska filed in the Ninth Circuit an emergency motion to intervene, or in the alternative, for substitution or for stay of the dismissal of the State's appeal. On February 7, 1995, after receiving letter briefs, the court of appeals denied the Legislature's motion, stating that "we conclude the Alaska State Legislature is not empowered under state law to intervene in this appeal." 94-1976 Pet. App. A1. The court also ordered the dismissal, from the interlocutory appeal, of the issue "whether ANILCA authorizes the Secretary to manage the subsistence priority in the absence of consistent Alaska laws." *Id.* at A4.

On February 15, 1995, the Alaska Fish and Wildlife Federation and Outdoor Council (AOC) moved to intervene for the purpose of continuing the appeal on the issue of the federal government's authority under ANILCA. AOC claimed to represent the interests of non-rural subsistence users of wild renewable

resources in Alaska who fear that federal implementation of the Title VIII priority will interfere with their ability to use subsistence resources. See 94-1829 Pet. App. 69a. The court of appeals denied AOC's motion in an order issued on February 23, 1995. *Id.* at 4a.

On April 20, 1995, the court of appeals reversed the district court's grant of summary judgment to the *Katie John* plaintiffs, and concluded that the term "public lands," within the meaning of ANILCA, includes only "those navigable waters in which the federal government has an interest under the reserved water rights doctrine." 94-1976 Pet. App. A58. The court rejected both the State's contention that the term excludes all navigable waters, and the *Katie John* plaintiffs' contention that it includes all navigable waters. *Ibid.* A petition for rehearing filed by the State of Alaska was denied on August 8, 1995.

ARGUMENT

The court of appeals denied petitioners' motions to intervene in a series of unpublished summary orders, which do not establish binding circuit precedent. Moreover, the court's resolution of the issue of intervention is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. a. The Legislature of Alaska attempted to intervene in this case after the only existing party with standing to appeal the district court's decision on the issue of federal authority, the State of Alaska, dismissed its appeal. To continue the appeal in the absence of the State, the Legislature itself must satisfy the requirements of Article III. See *Diamond* v. *Charles*, 476 U.S. 54, 69 (1986). In this case, the

Legislature has not satisfied one of the "irreducible constitutional minimum" requirements of Article III, that it demonstrate injury to a "legally protected interest." See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The State of Alaska, as a whole, may have a "legally protected interest," sufficient to satisfy Article III, in its authority to regulate public lands in Alaska under ANILCA. See *Diamond*, 476 U.S. at 65. The court of appeals in effect concluded, however, that the State, as represented by its executive branch, was the only entity authorized by state law to defend that interest in the courts, for it denied intervention to the Legislature on the ground that "the Alaska State Legislature is not empowered under state law to intervene in this appeal." 94-1976 Pet. App. A4. Accord *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 771 (10th Cir. 1980) (holding that "the *only* party with the requisite 'standing' * * * is the State of Colorado, represented here solely by the Colorado Attorney General by virtue of statutory and executive authority"), cert. denied, 450 U.S. 1050 (1981). The court's interpretation of Alaska law was in accord with "[t]he general rule * * * that, by virtue of constitutional and/or statutory provisions or common-law power, the state attorney general * * * is the exclusive legal representative of the state in all litigation * * * and he alone has the right to represent the state as to litigation involving a subject matter of statewide interest." 630 F.2d at 771. The Legislature points to no contrary authority establishing that it has a right to sue, under Alaska law, to defend the interests of the State as a whole.

The Legislature contends (94-1976 Pet. 8) that authorization of a governmental entity to sue under

state law is irrelevant to the question of Article III standing. That contention is inconsistent with *Karcher* v. *May*, 484 U.S. 72 (1987). In *Karcher*, the Court held that the former Speaker of the New Jersey General Assembly and former President of the New Jersey Senate, who had been authorized by the New Jersey Legislature to intervene in a lawsuit as representatives of their respective Houses to defend the constitutionality of a state statute, no longer had Article III standing after they left their leadership posts and their successors withdrew the appeal on behalf of the Legislature. *Id.* at 77-81. The Court noted that "[t]he authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded [Speaker] Karcher and [Senate President] Orechio in office." *Id.* at 77. Although Karcher and Orechio originally had Article III standing to represent the State's interests because they were authorized by state law to do so, they lost that standing once they lost their state-law authority to represent the interests of the State of New Jersey.

The Court did not hold in *Karcher* that a state legislature always has a protected legal interest in defending the constitutionality of legislation that it has passed, as the Legislature suggests (94-1976 Pet. 12). In *Karcher*, the Court noted that, under New Jersey law, as authoritatively construed by the New Jersey Supreme Court, the presiding officers of the New Jersey Legislature "had authority * * * to represent the State's interests" in court. 484 U.S. at 82. The Court therefore accepted that Karcher and Orechio had standing to represent the State's interests in the court of appeals while they still held their leadership positions, although not thereafter. But the Court did not announce a general rule that a

state legislature always has standing to defend the constitutionality of laws that it has enacted, or any other interest of the State as a whole in its authority to legislate and regulate.

b. Because the Legislature of Alaska is not authorized by state law to represent the interests of the State in this litigation, the Legislature has standing only if it has some other, distinct interest that would be affected by the case. The Legislature did not rely on any other interest, however, when it resolved to intervene in the lawsuit. The Legislature stated only that it intended to "defend[] the right of the State of Alaska to govern the management of fish and wildlife on public land in its territory." 94-1976 Pet. App. A72. That "right" is the interest of the State as a whole, the defense of which is vested by state law in the executive branch of the state government of Alaska. Because the Legislature asserted no other interest in the case, it has no standing to sue. Cf. *Karcher*, 484 U.S. at 78 (noting that "Karcher and Orechio's intervention as presiding legislative officers does not entitle them to appeal in their other individual and professional capacities").

The Legislature relies on "legislative standing" cases in which the courts have permitted state and federal legislative bodies and individual legislators to represent the interest of the legislature (94-1976 Pet. 11-12, 19-20). In those cases, however, the legislators were not seeking to represent the interest of the State or of the United States as a whole, but were attempting to protect the legislature's separate interest in a specific role in the lawmaking or governing process against encroachment by another branch of government. In *Coleman* v. *Miller*, 307 U.S. 433 (1939), for example, the Court concluded that

Kansas State Senators who had voted against adoption of a constitutional amendment had standing to challenge the vote of the Lieutenant Governor, who cast the deciding vote for adoption of the amendment. The interest represented by the state legislators was not the role of Kansas, as a State, in the amendment process, but the legislators' distinct "interest in maintaining the effectiveness of their votes" in that process under the Constitution against invasion by another state actor. *Id.* at 438. In *INS* v. *Chadha*, 462 U.S. 919 (1983), the Court observed that the United States House of Representatives and Senate had intervened in the litigation to defend the constitutionality of the legislative veto and were therefore proper parties to the case, *id.* at 930 n.5, but that case also involved Congress's role in making and enforcing federal law.[2]

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[2] In *Chadha*, the Court stated that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." 462 U.S. at 940. In neither of the cases cited in *Chadha* immediately after that sentence, however, did Congress appear as a party. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968) (*amicus curiae* defended judgment on statutory issue); *United States* v. *Lovett*, 328 U.S. 303, 304 (1946) (Congress appeared as *amicus curiae* to defend statute against various constitutional claims, including separation of powers claim). *Chadha* therefore cannot be taken to hold that Congress may always intervene to defend the constitutionality of a federal statute, or to appeal a judgment of unconstitutionality, whenever the Executive Branch declines to do so. Moreover, even if Congress does have the authority, as a matter of federal law, to intervene to defend the constitutionality of federal statutes and therefore has Article III standing in such cases, that does not mean that a state

The courts of appeals' legislative standing cases are to the same effect. In *Dennis* v. *Luis*, 741 F.2d 628 (1984), the Third Circuit ruled that members of the Virgin Islands Legislature had Article III standing to vindicate their advise-and-consent role in the appointment process against alleged encroachment by the Governor, but the court emphasized that the asserted right "has been vested only in members of the legislature." *Id.* at 631. In the D.C. Circuit's "pocket veto" cases, *Kennedy* v. *Sampson*, 511 F.2d 430 (1974), and *Barnes* v. *Kline*, 759 F.2d 21 (1984), vacated as moot, 479 U.S. 361 (1987), the court held that individual legislators had standing to challenge the President's exercise of a pocket veto as iconsistent with Article I, Section 7, of the Constitution, but the court stressed that the provisions at issue "define the prerogatives of each governmental branch in a manner which prevents overreaching by any one of them [and] allocate[] to the executive and legislative branches their respective roles in the lawmaking process." *Kennedy*, 511 F.2d at 434; accord *Barnes*, 759 F.2d at 26 (relying on *Kennedy* as law of the circuit). Therefore, although the courts have, in a handful of cases, ruled that legislators may sue to protect their distinct interest in the lawmaking process against alleged encroachment by another branch of the same governmental entity, they have not held that a state legislature may participate as a party to advocate the legal position of the State as a whole, when the legislature's interest in that position

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legislature also has Article III standing to defend the State's authority to regulate, in the absence of authorization under state law to represent the interest of the State as a whole.

is not different from the interest of the executive branch of the State.

This case is also distinguishable from cases such as *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (per curiam), in which the courts have permitted state legislators and legislative bodies to intervene in litigation over reapportionment plans. The Court noted in *Beens* that the State Senate would be "directly affected" by the district court's apportionment orders, since the composition of that body was at stake in the litigation. 406 U.S. at 194. In state apportionment cases, state legislators may have a distinct interest in the outcome of the legislation beyond their general interest in the validity of the apportionment law (which is shared by the State as a whole), since their tenure of office, indeed the existence of their positions, may be affected by the case. The Alaska Legislature has no such direct interest at stake in this case.

c. The Legislature lacks standing for the additional reason that the outcome of this litigation will not affect its authority to legislate—even if one assumes, *arguendo*, that such authority could provide it with a sufficient legally protected interest. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 561 (Article III standing requires that it be "likely" that an injury will be "redressed by a favorable decision"). Neither ANILCA nor this litigation has any effect on the Legislature's ability to perform its role in the state legislative process of considering and passing laws. Moreover, the authority of the State as a whole to regulate subsistence uses of fish and wildlife on "public lands" was curtailed by the enactment of ANILCA, which imposes, as a matter of federal law, substantive rules for preferences in the taking of fish

and wildlife. The Legislature has made no contention that ANILCA is unconstitutional. Therefore, the only pertinent question is *who* shall implement the preferences required by ANILCA—the federal departments or the executive agencies of the State of Alaska. When the laws passed by the Alaska Legislature were consistent with ANILCA, the State rather than the Secretary was responsible for implementing the subsistence right. But if the Legislature passes laws inconsistent with ANILCA, those laws could not be given effect because of the Supremacy Clause of the United States Constitution, irrespective of whether the Secretary of the Interior is authorized by ANILCA to fill the regulatory void. Accordingly, no injury to the Legislature's alleged independent interest in legislating for the public lands of Alaska could be redressed in this litigation if it were expanded to include the question of whether the Secretary may regulate when the State may not.

2. Petitioner AOC rests its claim of standing exclusively on the affidavits of members who speculate that future federal regulation could deprive them of subsistence resources on which they depend for food (94-1829 Pet. 11; 94-1829 Pet. App. 67a-69a). But, as we have noted (pp. 15-16, *supra*), the issue in this case on which AOC sought to intervene is the proper entity to implement the substantive requirements of ANILCA, and not the conformity of any particular regulation to those requirements. The AOC affidavits do not indicate how the interest of AOC's members in taking fish and wildlife would be affected by the fact that the Secretary, rather than the State, would implement ANILCA. AOC's claim to standing therefore fails because it has not shown a "causal connection between the injury and the conduct com-

plained of." *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 560.

AOC incorrectly contends (94-1829 Pet. 23) that the Ninth Circuit's denial of intervention without providing reasons conflicts with the Fourth Circuit's decision in *In re Sierra Club*, 945 F.2d 776, 780 (1991), where that court stated that the district court had abused its discretion by denying intervention without offering reasons. Although we agree that the better practice is for courts to provide reasons when denying intervention, *Sierra Club* did not announce an inflexible rule that such reasons must always be offered, even when it is clear that the parties seeking to intervene lack Article III standing. Furthermore, the principal justification for requiring a district court to provide reasons for denial of intervention (as in *Sierra Club*)—namely, to provide a record for review of the district court's action on the would-be intervenor's appeal of right (see *ibid.*)—does not apply to the same degree to the courts of appeals, which are called upon to allow intervention only in rare cases, as AOC recognizes (94-1829 Pet. 23). The Ninth Circuit's failure to explicate the reasons for its denial of intervention to AOC in this case therefore does not present an important issue warranting this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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